UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ROY L. JOHNSON, Appellant, v. GENERAL SERVICES ADMINISTRATION, Agency.	)	DOCKET NUMBER PH07529010015 DATE: JAN 2 8 1991

Roy L. Johnson, Huntington, West Virginia, pro se.

Manuel B. Oasin, Esquire, Philadelphia, Pennsylvania, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The agency petitions for review of the initial decision, issued February 1, 1990, that mitigated the appellant's removal to a a 5-day suspension. For the reasons set forth below, the Board GRANTS the agency's petition, REVERSES the initial decision, and SUSTAINS the agency's removal action.

BACKGROUND

The agency removed the appellant from his position of Maintenance Worker based upon charges of unavailability for duty, failure to follow proper procedures in requesting leave, and absence without leave (AWOL) from December 13, 1988,

through July 28, 1989. In proposing the appellant's removal on August 10, 1989, the agency specified the following: (1) The appellant did not report for duty since September 12, 1988, when he reported that he sustained an on-the-job injury; (2) the appellant's claim for workers' compensation benefits was approved through December 13, 1988; (3) because the appellant failed to justify his continuing absence from duty since December 14, 1988, the agency directed him, on April 4, 1989, to report for duty as of April 10, 1989, or to submit specific medical documentation, by April 14, 1989, explaining why he was unable to work; (4) the appellant did not report for duty or submit the medical justification by the specified dates; and (5) the medical evidence later submitted by the appellant on May 1, and 2, 1989, lacked sufficient information upon which to reach a decision regarding his continued absence.

The appellant filed a petition for appeal of this action with the Board's Philadelphia Regional Office. Following a hearing, the administrative judge mitigated the appellant's removal to a 5-day suspension, finding as follows: (1) The period of AWOL and unavailability for work from December 14, 1988, through December 23, 1988, could not be sustained because the appellant was entitled to benefits for a compensable injury during this time; (2) the period of AWOL and unavailability for work from December 14, 1988, through July 15, 1989, could not be sustained because the agency placed the appellant in leave-without-pay (LWOP) status during

this time; (3) the agency's revocation of the appellant's LWOP status and his placement in AWOL status from December 14, 1988, through July 15, 1989, and from July 16, 1989, through July 28, 1989, constituted an abuse of discretion; (4) the agency did not establish that it could take the removal action against the appellant on the basis of approved LWOP; (5) the agency proved that the appellant did not follow the proper leave procedures; and (6) a 5-day suspension was the maximum reasonable penalty for the sustained charge.

In its petition for review, the agency asserts that the administrative judge mischaracterized the charge relating to the appellant's unavailability for work, and that it acted properly in placing the appellant in AWOL status.[1]

ANALYSIS

The agency has not established that the administrative judge mischaracterized the unavailability-to-work charge.

The agency asserts that the administrative judge erroneously treated the unavailability-to-work charge as part of the AWOL charge when, in fact, they are unrelated. The agency further asserts that, because the appellant stated that he was unavailable for duty for an indefinite period or until

[1] The agency also requests the Board to stay the interim relief ordered by the administrative judge under section 6 of the Whistleblower Protection Act of 1989, Pub. L. No. 101-12 (to be codified at 5 U.S.C. § 7701(b)(2)(A)). However, the agency submitted with its petition a SF-50 showing that it reinstated the appellant in his position, and the appellant has not argued that the agency failed to comply with the order. Because we are reversing the initial decision and sustaining the appellant's removal, the agency's objection to the imposition of interim relief in the present case is moot.

a doctor tells him to return to work, his removal is appropriate under the Board's decisions in *Coley v. Department of the Army*, 29 M.S.P.R. 101, 104 (1985), and *Ward v. General Services Administration*, 28 M.S.P.R. 207, 209 (1985). We disagree.

The record establishes that the agency charged the appellant with "unavailability for duty, failure to follow the proper procedures in requesting leave and Absence Without Leave (AWOL) since December 14, 1988, for a total of one thousand three hundred and four (1304) hours through July 28, 1989." Agency File, Tabs 4d, 4h. With respect to the unavailability-to-work charge and the AWOL charge, the administrative judge found that the agency charged the appellant with "the appellant's unavailability for duty from December 14, 1988 until July 28, 1989 ... [and] AWOL during the same time period." Initial Decision at 2.

In both *Coley* and *Ward*, the Board sustained removal actions where the agencies proved charges that the appellants were physically unable to perform the duties of their positions. *Coley*, 29 M.S.P.R. at 106; *Ward*, 28 M.S.P.R. 208-09. In the present case, however, the agency has not charged the appellant with physical inability to perform the duties of his position. It merely stated that he was unavailable for work. Agency File, Tab 4h. Indeed, its notice of proposed removal indicated that the medical evidence it had before it was insufficient to make a determination about the appellant's continuing status. *Id.* Thus, because the agency has not

established that it took the action against the appellant on the basis of a physical inability to perform his duties, we find that the administrative judge characterized the charges against the appellant properly. We, therefore, conclude that the agency has not shown prejudicial error in this respect. *Cf. Karapinka v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981) (the administrative judge's procedural error is of no legal consequence unless it is shown that it has adversely affected a party's substantive rights).

The administrative judge erroneously concluded that the agency action could not be sustained because it was taken on the basis of approved LWOP.

The administrative judge found that the agency improperly charged the appellant with AWOL from December 24, 1988, through July 15, 1989, because it did not inform him that it was denying his request for LWOP for this time and because it continued to carry the appellant on LWOP for purposes of his time and attendance. Initial Decision at 8. The administrative judge also found that the denial of the appellant's LWOP request was unreasonable because, in addition to not timely notifying the appellant of the denial, the agency did not order him to report for work, the appellant was not absent over 1 year, and was not warned that adverse action would be taken against him unless he returned to work.

We find, however, that the agency's denial of the appellant's LWOP request for the absences after December 28,

1988[2] was not unreasonable under the circumstances of this case, and that the agency's decision to carry the appellant on LWOP does not foreclose it from changing that status to AWOL and taking an adverse action against the appellant on that basis. We base this conclusion on the appellant's failure to both request LWOP in a timely manner and to keep the agency apprised of his availability for work, the agency's denial of his requests for LWOP, and the appellant's failure to return to work or submit medical evidence justifying his continued absence after the agency directed him to do so and warned him that his failure to do so could result in disciplinary action.

The record establishes that on October 27, 1988, and November 21, 1988, the appellant requested LWOP for the periods October 27, through November 27, 1988, and November 28 through December 28, 1988. Appeal File, Tab 9-2. The agency granted both of these requests. Hearing Transcript (Tr.) at 7. Following the expiration of these periods of approved LWOP, however, the appellant made no further effort to request LWOP or to inform the agency of his availability for work until April 18, and April 20, 1989, when he requested LWOP for December 29, 1988, through May 31, 1989. Appeal File, Tab 9-2. The agency denied these requests. Initial Decision at 8.

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[2] The administrative judge also correctly found that the appellant could not be charged AWOL for the period December 14 through December 23, 1988, because the appellant was entitled to receive benefits for a compensable injury during that time. Agency File, Tab 4z1. *See Mainor v. Department of the Navy*, 38 M.S.P.R. 528, 531 (1988). Further, the agency concedes that it approved the appellant's request for LWOP through December 28, 1988. Petition for Review at 4.

The appellant explained that he did not receive any notification regarding his leave requests, and that he just assumed that the agency had approved them. Tr. at 64-65. He also stated that he did not submit leave requests following expiration of the approved LWOP on December 28, 1988, because he had moved and no one had contacted him. *Id.* We find, however, that the appellant's actions were inconsistent with his responsibility for requesting leave and for keeping the agency informed about his availability for work. *See Cresson v. Department of the Air Force*, 33 M.S.P.R. 178, 181-82 (1987). We, therefore, conclude that the agency did not abuse its discretion in denying the appellant's request for LWOP.

Further, contrary to the administrative judge's findings, the agency did order the appellant to return to work and warn him that he could be removed for not doing so. By letter dated April 4, 1989, the agency directed the appellant to report to work or to provide acceptable medical documentation to support his continuing absence, and warned him that his failure to report for duty or to provide the specific medical information would result in further administrative action that could include his removal. Agency File, Tab 4n. The appellant, however, failed to report to work, and the medical evidence he eventually submitted was inconsistent and did not substantiate his continued absences. Initial Decision at 4, 9. Thus, the agency's denial of the appellant's requests for LWOP did not constitute an abuse of discretion. *See Desiderio v. Department of the Navy*, 4 M.S.P.R. 84, 86 (1980).

In reaching this conclusion, we also note that the agency's action of temporarily carrying the appellant in LWOP status, despite its decision to deny his request for LWOP, does not preclude it from ultimately determining that the appellant's proper leave status for the period in question should be AWOL. The agency explained that it continued to carry the appellant in LWOP status as an administrative convenience pending action on his workers' compensation claim. Initial Decision at 5. Agencies, however, may correct an employee's leave status based upon later information. *See* Federal Personnel Manual Chapter 630, Subch. 1-6.

Finally, we find that the appellant's removal for the sustained charges of failure to follow procedures and absence without leave for the time periods discussed above is within the bounds of reasonableness and promotes the efficiency of the service. *See Davis v. Veterans Administration*, 792 F.2d 1111, 1112-13 (Fed. Cir. 1986); *Cresson*, 33 M.S.P.R. at 184-85.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. §7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.